

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 BIG CONSTRUCTION, INC.,
12 DANNY KIM,,

13 Plaintiffs,

14 v.

15 GEMINI INSURANCE COMPANY, JOHN
16 and JANE DOES 1-15,

Defendants.

CASE NO. C12-5015 RJB

ORDER DENYING PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
GRANTING DEFENDANT
GEMINI'S CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT

17 This matter comes before the Court on cross-motions for summary judgment. Plaintiffs,
18 Big Construction, Inc., and Danny Kim (Big Construction), move for partial summary judgment
19 seeking to establish that Defendant Gemini Insurance Company (Gemini) breached a duty to
20 defend the Plaintiffs from claims asserted against them in *Wayne Kim v. Big Construction, Inc.*
21 *et.al.*, Pierce County Cause No. 08-2-10705-7 (underlying Wayne Kim Complaint). Dkt. 15.
22 Defendant Gemini moves for partial summary judgment requesting a finding that Gemini had no
23 duty to defend or cover the claims in the underlying lawsuit. Dkt. 25. The Court has considered

24 ORDER DENYING PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT AND
GRANTING DEFENDANT GEMINI'S CROSS-
MOTION FOR PARTIAL SUMMARY
JUDGMENT- 1

1 the pleadings in support of and in opposition to the cross-motions for summary judgment and the
2 record herein.

3 INTRODUCTION AND BACKGROUND

4 The material facts are undisputed. The underlying Wayne Kim Complaint makes the
5 following allegations:

6 III. FACTS

7 * * *

8 3.2 On or about April 17, 2007, Defendant Danny Kim, as a general
9 contractor and owner of Big Construction, entered into an agreement with
10 Plaintiff Wayne Kim for services involving the demolition and new construction
11 of the residence located at 3530 Soundview Drive West, University Place,
Washington. This contract estimated the total price for the work completed to be
\$889,000.00 including options and all construction work.

12 * * *

13 3.4 Defendant Big Construction failed to complete the construction work
14 to the satisfaction of Plaintiff in a timely manner or in a manner at or above
industry standards for quality for this type of construction as required by
contract.

15 3.5 An independent inspection completed by structural engineers, Wang
16 Engineers, discovered a failure in the steel framing and construction of the
home[.] This failure will require large amounts to repair. This incomplete
17 framing of the steal [sic] structure was completed by Big Construction.

18 3.6 Defendants Big Construction caused residence . . . to be over
19 excavated by more than twelve inches, thus causing the failure of the steel
framing. Big Construction had been advised of the impropriety of overexcavating
20 by structural engineers but failed to adhere to the advice and
continued construction resulting in the unsoundness of the residence.

21 3.7 Plaintiff Kim has paid Big Construction more than 1.2 million dollars
22 for construction work on [the residence]. Due to the failure of Big Construction
and its subcontractors, more than \$500,000.00 is needed for repairs and
23 completion of the house, as estimated by independent general contractors.

1 3.8 Defendant Big Construction fraudulently charged Plaintiff Kim
2 \$138,099.63 for removal of a heating oil tank, representing charges over and
3 above industry accepted standards.

4 * * *

5 3.10 Defendant[] Big Construction caused to be removed eighty
6 yards of contaminated dirt from the property and ha[s] no record of the
7 location to which the dirt was taken in violation of MTCA[.]

8 3.12 Defendant Big Construction failed to repair substandard and
9 below Pierce County Code construction after being informed by Pierce
10 County Inspectors of the violations. This failure resulted in an additional
11 expense for a re-inspection which also resulted in many violations.

12 3.13 Incomplete and below industry standard work has caused
13 Plaintiff to incur over \$750,000.00 in additional construction expense
14 and diminution of property value on the home[.]

15 Dkt. 26-1 pp. 25-27.

16 The underlying complaint sets forth the following causes of action:

17 BREACH OF CONTRACT

18 4.2 Defendant Big Construction, breached its contract for the remodeling
19 of Plaintiff's home when it failed to complete the construction work in a timely
20 manner and to the satisfaction of Plaintiff as required by the contract. Plaintiff
21 has had no option but to hire other contractors to complete the project. Plaintiff
22 is damaged in a principal amount of \$750,000 or such greater amount as may be
23 proven at trial[.]

24 4.3 Defendant Big Construction failed to complete construction in a
manner at or above industry standard. This failure resulted in the continued
failure of inspections and the eventual uninhabitability of the residence[.]

CONSUMER PROTECTION ACT

5.2 Defendant Big Construction violated the Consumer Protection Act . . .
by using its superior knowledge of construction and associated costs to
overcharge, deceive and fraud, Plaintiff Kim throughout the demolition and
construction process.

1
2 5.3 Defendants Big Construction ... engaged in unfair and deceptive actions.
3 The acts and practices occurred in the conduct of Defendants' trade as a
4 contractor ... The act or practice affected the public interest and caused
Plaintiff injury in his property. Defendants' actions caused Plaintiffs injury.

5 **MODEL TOXICS CONTROL ACT (MTCA)**

6 * * *

6 6.5 Defendant Big Construction, in violation of RCW 70.105D.040,
7 arranged by contract for the removal and disposal of the potentially hazardous
waste identified at the time of the tank removal.

8 6.6 Defendants Big Construction ... caused Plaintiff, through their acts of
9 fraudulent and negligent removal of the heating oil tank and surrounding
potentially hazardous soil, to be potentially liable [under MTCA] as an
owner of the residence.

10 Dkt. 26-1 pp. 27-29.

11 Plaintiffs in the underlying Wayne Kim Complaint also seek to quiet title to the property
12 and to recover on the contractor's bond. Dkt. 26-1 pp. 29-31.

13 Gemini Insurance Company issued general liability insurance to Plaintiff Big
14 Construction, Inc. under policy No. VIGP 008421, which was in effect from August 22, 2007 to
15 August 22, 2008, and is the policy at issue in this action. Dkt. 11 pp. 19; Dkt 26-1 pp. 2-4. The
16 policy's coverage is provided in Commercial General Liability Coverage Form No. CG 00 01 07
17 98, which contains the following insuring clause and definitions:

18 **SECTION I – COVERAGES**

19 **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

20 **1. Insuring Agreement**

21 **a.** We will pay those sums that the insured becomes legally obligated to pay
22 as damages because of "bodily injury" or "property damage" to which
23 this insurance applies. We will have the right and duty to defend the
insured against any "suit" seeking those damages. However, we will

1 have no duty to defend the insured against any “suit” seeking damages
2 for “bodily injury” or “property damage” to which this insurance does
not apply. We may, at our discretion, investigate any “occurrence” and
3 settle any claim or “suit” that may result. . . .

4 * * *

5 No other obligation or liability to pay sums or perform acts or services is
covered unless explicitly provided for under Supplementary Payments –
6 Coverages A and B.

7 **b.** This insurance applies to “bodily injury” and “property damage” only if:

8 (1) The “bodily injury” or “property damage” is caused by an
“occurrence” that takes place in the “coverage territory”; and

9 (2) The “bodily injury” or “property damage” occurs during
the policy period.

10 ***

11 **2. Exclusions**

12 This insurance does not apply to:

13 **j. Damage To Property**

14 “Property damage” to:

15 ***

16 (5) That particular part of real property on which you or any
contractors or subcontractors working directly or indirectly
on your behalf are performing operations, if the “property
17 damage” arises out of those operations; or

18 (6) That particular part of any property that must be restored,
repaired, or replaced because “your work” was incorrectly
19 performed on it.

20 ***

21 **m. Damage To Impaired Property Or Property Not Physically Injured**

22 “Property damage” to “impaired property” or property that
has not been physically injured, arising out of:

23 (1) A defect, deficiency, inadequacy or dangerous condition

1 in "your product" or "your work"; or

- 2 (2) A delay or failure by you or anyone acting on your behalf to
3 perform a contract or agreement in accordance with its terms.

4 This exclusion does not apply to the loss of use of
5 other property arising out of sudden and accidental
6 physical injury to "your product" or "your work" after
7 it has been put to its intended use.

8 ***

9 **SECTION V – DEFINITIONS**

10 * * *

11 **13.** "Occurrence" means an accident, including continuous or repeated exposure
12 to substantially the same general harmful conditions.

13 * * *

14 **17.** "Property damage" means:

15 **a.** Physical injury to tangible property, including all resulting loss of use of
16 that property. All such loss of use shall be deemed to occur at the time of
17 the physical injury that caused it; or

18 **b.** Loss of use of tangible property that is not physically injured. All such
19 loss of use shall be deemed to occur at the time of the "occurrence" that
20 caused it.

21 Dkt. 26-1 pp. 7-10, 16-19

22 On September 29, 2008, Gemini informed Big Construction by fax that it was declining
23 to defend or provide coverage to Big Construction for the underlying Kim lawsuit. Dkt. 11 pp.

24 16-17. On October 1, 2008, Gemini sent a certified declination letter to Big Construction setting
for the reasons for denial:

In review of the above-quoted policy, for there to be coverage under the same
subject policy, there must be "property damage" and/or "bodily injury" which
occurs during the policy period and is caused by an "occurrence". **Since the
project was not completed at the time your policy with Gemini Insurance
Company expired, August 27, 2008, there is no occurrence during your
policy period and coverage does not apply to this loss.**

1 * * *

2
3 There is no coverage under the policy for any damages claimed as a result of
4 your failing to fulfill the terms of a contract or agreement if such damages do not
5 constitute "property damage" and/or "bodily injury" from an "occurrence" as
defined in the policy.

6 The Gemini Insurance Company policy are subject to a variety of terms and
7 conditions as set forth in the captioned policy and to other legal and equitable
8 defenses, including but not limited to, the denial of coverages for damages
9 not arising from "property damage" and/or "bodily injury" as those terms are
10 defined in the policy. **There is no coverage under the policy for any damages
11 claimed as a result of your failing to fulfill the terms of a contract or agreement
12 if such damages do not constitute "property damage" and/or "bodily injury"
13 from an "occurrence", as defined in the policy.**

14 It is the position of Gemini Insurance Company that the above-cited policy
15 provisions apply with respect to the claim being presented by the plaintiffs in this
16 matter. Therefore, we must respectfully disclaim coverage and inform you that Big
17 Construction, Inc. is not entitled to benefits under the above-captioned policy of
18 insurance...

19 By naming the specific grounds for this disclaimer of coverage, we do not waive
20 any of our rights or any of the other provisions or conditions of the policy of
21 insurance and specifically reserve all of our rights and remedies under this policy
22 and under the statutes and common law.

23 Dkt. 26-1 pp. 32, 41-42. (Emphasis in original)

24 The underlying Kim suit went to trial in the fall of 2010. On November 19, 2010, the
trial court entered judgment against Big Construction for \$45,096. Dkt. 26-1 pp. 44-48. The
court entered Findings of Fact that state in part: (1) Defendants fabricated and or installed the
structure's steel moment frame in a manner not consistent with the drawings and specifications of
the structural engineer, (2) Defendants installed a number of non-tempered windows in locations
where tempered windows were required, (3) Defendants failed to level the main floor of the
house uniformly, leading to a noticeable incline in certain areas, and (4) The total amount paid

1 by Plaintiffs to retrofit and repair errors and omissions attributable to Defendants and to make
2 the unpaid subcontractors whole is \$45,096.38. Dkt. 26-1 pp. 40.

3 The Court entered Conclusions of Law that provide in part: (1) The moment frame,
4 windows, and construction by Defendants was not completed in a manner at or above industry
5 standards for quality for this type of construction, (2) Plaintiffs are entitled to recover from
6 Defendants the amounts paid by Plaintiffs to the subcontractors with outstanding balances owed
7 at the time of the termination of Defendants and the amounts expended by Plaintiffs to repair and
8 retrofit the faulty construction of the moment frame, windows, and floor, (3) Plaintiffs are entitled
9 to judgment against Defendants Big Construction and Danny Kim, jointly and severally, in the
10 amount of \$45,096.38. Dkt. 26-1 pp. 46-47.

11 In June 2011, counsel for Big Construction sent a letter to Gemini asserting that Gemini
12 breached its contract and acted in bad faith when it declined to defend or provide coverage for
13 the underlying litigation. Dkt. 11 pp. 34-35. Gemini responded and informed Big Construction
14 that it was adhering to its prior denial of a defense and coverage. Dkt. 11 pp. 37-50. On
15 September 13, 2011, Big Construction notified Gemini of its intent to assert an Insurance Fair
16 Conduct Act (IFCA) claim. Dkt. 11 pp. 52-55.

17 On November 22, 2011, Big Construction commenced this action against Gemini. Dkt. 11
18 pp. 57-69. The present cross-motions for summary judgment followed.

19 SUMMARY JUDGMENT STANDARD

20 Summary judgment is appropriate only when the pleadings, depositions, answers to
21 interrogatories, affidavits or declarations, stipulations, admissions, answers to interrogatories,
22 and other materials in the record show that “there is no genuine issue as to any material fact and
23 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In assessing a

1 motion for summary judgment, the evidence, together with all inferences that can reasonably be
2 drawn therefrom, must be read in the light most favorable to the party opposing the motion.

3 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *County of*
4 *Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

5 The moving party bears the initial burden of informing the court of the basis for its
6 motion, along with evidence showing the absence of any genuine issue of material fact. *Celotex*
7 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of
8 proof, the moving party must make a showing that is sufficient for the court to hold that no
9 reasonable trier of fact could find other than for the moving party. *Idema v. Dreamworks, Inc.*,
10 162 F.Supp.2d 1129, 1141 (C.D. Cal. 2001).

11 To successfully rebut a motion for summary judgment, the non-moving party must point
12 to facts supported by the record which demonstrate a genuine issue of material fact. *Reese v.*
13 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact that might
14 affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477
15 U.S. 242, 248 (1986). Where reasonable minds could differ on the material facts at issue,
16 summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A
17 dispute regarding a material fact is considered genuine “if the evidence is such that a reasonable
18 jury could return a verdict for the nonmoving party.” *Anderson*, at 248. The mere existence of a
19 scintilla of evidence in support of the party's position is insufficient to establish a genuine
20 dispute; there must be evidence on which a jury could reasonably find for the party. *Id.*, at 252.

21 The instant action was removed to this Court based on diversity of the parties.
22 Accordingly, the issues presented are governed by Washington State law. *See Insurance Co. N.*
23 *Am. v. Federal Express Corp.*, 189 F.3d 914, 919 (9th Cir. 1999). Washington State law is clear

1 that the interpretation of policy language contained in an insurance contract is a question of law.
2 *Butzberger v. Foster*, 151 Wn.2d 396, 401 (2004); *State Farm General Ins. Co. v. Emerson*, 102
3 Wn.2d 477, 480 (1984). Where there are no material facts in dispute, interpretation of the
4 insuring language at issue is appropriately decided on summary judgment. See *American*
5 *Bankers Ins. v. N.W. Nat. Ins.*, 198 F.3d 1332 (11th Cir. 1999).

6 **INSURERS' DUTY TO DEFEND AND PROVIDE COVERAGE**

7 Big Construction alleges that Gemini breached the duty to defend in accordance with the
8 terms of the insurance policy. Gemini asserts that it had no duty to defend or indemnify Big
9 Construction.

10 Third-party liability insurance carriers generally owe their insureds two duties under the
11 policy: the duty to defend suits against them and the duty to indemnify the insured for
12 judgments and settlements covered under the terms of the policy. *Mutual of Enumclaw Ins. Co.*
13 *v. Dan Paulson Constr. Co.*, 161 Wn.2d 903, 916 (2007). The rule regarding the duty to defend
14 is well settled in Washington and is broader than the duty to indemnify. *Hayden v. Mut. of*
15 *Enumclaw Ins. Co.*, 141 Wn.2d 55, 64 (2000). The duty to defend arises at the time an action is
16 first brought, and is based on the potential for liability. *Truck Ins. Exch. v. VanPort Homes, Inc.*,
17 147 Wn.2d 751, 760 (2002). The duty to defend is determined by the facts alleged, not by the
18 legal theories asserted. *Zurich American Ins. Co. v. R.L. Alia Co.*, 2009 WL 959864 (W.D.
19 Wash. 2009). An insurer has a duty to defend when a complaint against the insured, construed
20 liberally, alleges facts which could, if proven, impose liability upon the insured within the
21 policy's coverage. *Truck Ins. Exch.*, at 760; *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 425
22 (1999). An insurer is not relieved of its duty to defend unless the claim alleged in the complaint
23

1 is clearly not covered by the policy. *Truck Ins. Exch.*, at 760; *Kirk v. Mt. Airy Ins. Co.*, 134
2 Wn.2d 558, 561 (1998).

3 In contrast to the duty to defend, the duty to indemnify “hinges on the insured's actual
4 liability to the claimant and actual coverage under the policy.” *Hayden*, 141 Wn.2d at 64. In
5 sum, the duty to defend is triggered if the insurance policy conceivably covers the factual
6 allegations in the complaint, whereas the duty to indemnify exists only if the policy actually
7 covers the insured's liability.

8 The burden is on the insured to establish coverage under an insurance policy. The insurer
9 has the burden of establishing the applicability of an exclusion. *Mutual of Enumclaw Ins. Co. v.*
10 *Patrick Archer Const., Inc.*, 123 Wn.App. 728, 732 (2004); *Diamaco, Inc. v. Aetna Cas. & Sur.*
11 *Co.*, 97 Wn.App. 335, 337 (1999).

12 **Occurrence and Property Damage**

13 To determine whether disputed damages are covered under a commercial general liability
14 insurance policy, the Court considers (1) whether the alleged damages constitute “property
15 damage,” (2) whether there was an “occurrence” that gave rise to the property damages, and (3)
16 whether the property damages are barred by specific policy exclusions. *Dewitt Const. Inc. v.*
17 *Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1133 (9th Cir. 2002). When determining whether an
18 insurer has a duty to defend or indemnify, the Court looks first to the insurance policy to
19 determine if the alleged damage is “conceivably covered.” *Hayden v. Mutual of Enumclaw Ins.*
20 *Co.*, 141 Wash.2d 55, 64 (2000). If the alleged damage falls within the scope of the coverage,
21 the Court then determines if policy exclusions bar coverage. *Id.* Insurance policy exclusions are
22 strictly construed in favor of finding coverage for the insured. *Id.*; see also *Aetna Cas. & Sur. Co.*
23 *v. M & S Indus.*, 64 Wn.App. 916, 923 (1992).

1 As the insured, Big Construction has the burden to establish that the claims in the
2 underlying suit fall within the coverage provided under Gemini's policy. See *E-Z Loader Boat*
3 *Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 906 (1986). Gemini's policy covers Big
4 Construction's liability for damages because of "property damage" that is caused by an
5 "occurrence." The policy defines "occurrence" as "an accident" which results in "property
6 damage." "Property damage," in turn, is defined as "physical injury to tangible property" and as
7 "loss of use of tangible property that is not physically injured." Dkt. 26-1 pp. 7-10, 16-19. Thus,
8 there must be accidental physical injury to tangible property or loss of use of tangible property.

9 A general liability policy is not intended to encompass the risk of an insured's failure to
10 adequately perform work. *Westman Indus. Co. v. Hartford Ins. Group*, 51 Wn.App. 72, 80
11 (1988). Rather, the policies are most often intended to cover unforeseeable accidents. *Hayden*,
12 141 Wn.2d at 59. Pure workmanship defects are not considered accidents or occurrences, since
13 commercial general liability policies are not meant to be performance bonds or product liability
14 insurance. *Mutual of Enumclaw Ins. Co. v. Patrick Archer Const., Inc.*, 123 Wn.App. 728, 733,
15 (2004); *Aetna Cas. & Sur. Co. v. M & S Indus.*, 64 Wn.App. 916, 922 (1992). Commercial
16 general liability policies are designed generally to provide coverage for a number of risks,
17 including employee injuries while on the work site and physical damage to property other than
18 the work of the insured. "When an insurer issues a general liability policy, it is not issuing a
19 performance bond, product liability insurance, or malpractice insurance." *Aetna Cas. & Sur. Co.*
20 *v. M&S Indus., Inc.*, 64 Wn. App. 916, 921 (1992). Liability insurance policies therefore do not
21 cover an insured's business risk of performing faulty work. See e.g., *Harrison Plumbing &*
22 *Heating, Inc. v. New Hampshire Ins. Group*, 37 Wn. App. 621, 628 (1984). There is no coverage
23 for repairing or replacing an insured's defective work. For faulty workmanship to give rise to

1 property damage there must be property damage separate from the defective product itself. See
2 *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 93 Wn.2d 210 (1980); *Anthem Electronics,*
3 *Inc. v. Pacific Employers Ins. Co.*, 302 F.3d 1049, 1057 (9th Cir. 2002).

4 The underlying Kim Complaint, liberally construed, fails to allege facts, if proven, which
5 would impose liability upon the insured within the policy's coverage. First, the Kim Complaint
6 alleges that Big Construction “failed to complete the construction work to the satisfaction of
7 Plaintiff in a timely manner or in a manner at or above industry standards.” Dkt. 26-1 pp. 23.
8 This does not describe any “property damage” caused by an “occurrence” so as to be even
9 conceivably covered under Gemini’s policy. Allegations of incomplete, non-conforming,
10 unsatisfactory, and otherwise defective work did not give rise to any duty to defend.

11 Second, the Kim Complaint alleges that there was “a failure in the steel framing and
12 construction of the home [that] will require large amounts to repair.” Dkt. 26-1 pp. 23. Again
13 this allegation fails to assert accidental physical injury to tangible property.

14 Third, the Kim Complaint alleges that Big Construction “caused [the] residence . . . to be
15 over excavated by more than twelve inches, thus causing the failure of the steel framing.” Dkt.
16 26-1 pp. 23-24. This deviation from construction requirements may have impacted other
17 construction at the project, but it does not involve any conceivable “property damage” or an
18 “occurrence.”

19 Fourth, the Kim Complaint alleges that “more than \$500,000 is needed for repairs and
20 completion of the house” because of Big Construction’s “failures,” and that Big Construction
21 “failed to repair substandard and below Pierce County Code construction” after being informed
22 of the violations. Dkt. 26-1 pp. 24. Costs to complete or repair Big Construction’s defective or
23 unsatisfactory work are not “property damage” or an “occurrence.”

1 Fifth, the Kim Complaint alleges that “Big Construction fraudulently charged . . . for
2 removal of a heating oil tank.” Dkt. 26-1 pp. 24. Claims for fraud and overcharging likewise do
3 not involve any “property damage” or an “occurrence.”

4 Sixth, the Kim Complaint alleges that Big Construction “caused to be removed eighty
5 yards of contaminated dirt from the property and ha[s] no record of the location to which the dirt
6 was taken in violation of MTCA (Model Toxic Control Act),” and Big Construction, “in
7 violation of [MTCA], arranged by contract for the removal and disposal of the potentially
8 hazardous waste identified at the time of the tank removal.” Dkt. 26-1 pp. 24, 27. Alleged
9 violations of regulatory standards do not involve any “property damage” or an “occurrence.”
10 *Holly Mountain Resources v. Westport Ins. Co.*, 130 Wn.App. 635 (2005); *Zurich American Ins.*
11 *Co. v. R.L. Alia Co.*, 2009 WL 959864 (W.D. Wash. 2009).

12 Seventh, the Kim Complaint alleges that Big Construction’s “[i]ncomplete and below
13 industry standard work has caused Plaintiff to incur . . . diminution of property value on the
14 home.” Dkt. 26-1 pp. 25. Diminution in value by itself is pure economic loss and not “physical
15 injury to tangible property.” *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 888 (2004).

16 Eighth, the Kim Complaint alleges that Big Construction’s faulty work “resulted in the
17 continued failure of inspections and the eventual uninhabitability of the residence. Again, this
18 allegation does not meet the criteria of accidental damage to tangible property. See *Scottsdale*
19 *Ins. Co. v. International Protective Agency, Inc.*, 105 Wn. App. 244, 250 (2001).

20 Ninth, the underlying Consumer Protection Act (CPA) claim does not give rise to a duty
21 to defend. Allegations of deceptive acts and fraud do not involve any “accidental” conduct so as
22 to qualify as an “occurrence” under liability insurance. See *Palouse Seed Co. v. Aetna Ins. Co.*,
23 40 Wn. App. 119, 122 (1985); *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 888 (2004).

1 In sum, the underlying Kim Complaint does not allege any claims that could have
2 “conceivably” described “property damage” that was caused by an “occurrence.” Gemini had no
3 duty to defend or indemnify Big Construction.

4 **Exclusions**

5 Even if it were conceivable to consider the factual allegations in the underlying Kim
6 Complaint as describing an “occurrence” and “property damage,” they would nonetheless fall
7 within the business risk exclusions to coverage contained in the Gemini commercial general
8 liability policy.

9 Policy Exclusion j, the ongoing operations exclusion, excludes coverage for “property
10 damage to [t]hat particular part of real property which you or any contractors or subcontractors
11 ... are performing operations if the property damage arise out of those operations ...” Dkt. 26-1
12 pp. 10. Exclusion j also bars coverage for “[t]hat particular part of any property that must be
13 restored, repaired, or replaced because “your work” was incorrectly performed on it.” Dkt. 26-1
14 pp. 10. This ongoing operations exclusion is designed to exclude coverage for defective
15 workmanship by the insured builder causing damage to the construction project. *Canal Indem.*
16 *Co. v. Adair Homes, Inc.*, 737 F.Supp.2d 1294, 1301-02 (W.D.Wash. 2010); *Harrison Plumbing*
17 *& Heating, Inc. v. New Hampshire Insurance Group*, 37 Wn. App. 621, 626 (1984)(ongoing
18 operations exclusion ensures that an insured is not indemnified for damages resulting because the
19 insured furnished defective materials or workmanship).

20 Policy exclusion m, the loss of use exclusion, applies to claims arising out of the loss of
21 use of tangible property, which has not been physically injured, resulting from the insured's
22 faulty performance of a contract. Dkt. 26-1 p.10. This exclusion bars coverage for any “loss of
23 use” property damage arising out of Big Construction’s defective work or breach of contract.

1 The “loss of use” exclusion applies to claims arising out of the loss of use of
2 tangible property, which has not been physically injured, resulting from either the
3 insured’s delayed performance of a contract, or an insured’s faulty performance
4 of that contract. This exclusion helps distinguish between that which is covered
under the policy, i.e., the physical breakdown of the insured’s product that results
in some type of injury to person or property, and that which is not covered, i.e.,
the mere failure of the product to perform as well as warranted. . . .

5 *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 65-66 (2000).

6 The on-going operations and loss of use exclusions are common “business risk”
7 exclusions, designed to prevent the commercial general liability policy from being considered a
8 performance bond, product liability insurance, or malpractice insurance. See e.g., *Hayden* at 64;
9 *Schwindt v. Underwriters at Lloyd’s of London*, 81 Wn. App. 293, 302 (1996); *Aetna Cas. &*
10 *Sur. Co. v. M & S Indus., Inc.*, 64 Wn. App. 916, 921 (1992). Business risk exclusions are meant
11 to prevent the insured from passing on to their insurers the ordinary costs of doing business.
12 *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 771-72, 58 P.3d 276 (2002) (Liability
13 policies do not insure against the simple cost of poor performance.) Where the only damage is to
14 the property on which the insured is working, there is no coverage. *Vandivort Constr. Co. v.*
15 *Seattle Tennis Club*, 11 Wn. App. 303, 307-08 (1974).

16 The two business risk exclusions clearly and unambiguously exclude coverage for the
17 underlying claims and supports Gemini’s denial of a defense to the suit.

18 CONCLUSION

19 For the foregoing reasons, Big Construction’s motion for summary judgment should be
20 denied. Summary judgment should, instead, be granted for Gemini finding as a matter of law
21 that Gemini had no duty to defend or cover the underlying Kim Suit.

Therefore, it is hereby **ORDERED:**

1. Plaintiffs' Motion for Partial Summary Judgment and Declaratory Relief (Dkt. 15) is

DENIED.

2. Defendant Gemini's Cross-Motion for Partial Summary Judgment (Dkt. 25) is

GRANTED.

3. Gemini Insurance Company had no duty to defend or indemnify Big Construction Inc., and Danny Kim in the underlying suit, *Kim v. Big Constr., Inc., et al*, Pierce County Superior Court No. 08-2-10705-7.

4. The parties are directed to inform the Court, no later than May 25, 2012, whether there are any remaining claims in this action, or whether the case is subject to dismissal in its entirety.

Dated this 22nd day of May, 2012.



ROBERT J. BRYAN
United States District Judge